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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 452

CARGO SHIPS & TANKERS, INC.,

Petitioner,

—against—

JOHN A. RUSH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

In a seaman's Jones Act suit where the verdict is not claimed to be excessive, is it reversible error for the trial court to deny defendant's motion to charge the jury to disregard the suggestion of plaintiff's counsel on summation, that pain and suffering be measured in dollars on a "unit of time" basis where he also stated that the figures were only suggested, that the jury might find them too high or too low and that their determination controlled?

Statement

Respondent's proof of the serious, permanent and painful nature of his injuries was not contested by

the petitioner who did not call its examining physician. That physician's report received in evidence over petitioner's objection disclosed that respondent had suffered permanent and painful injuries. Petitioner did not move to set aside the verdict for excessiveness or claim that it was excessive on appeal.

Reasons for Denial of the Writ

1. *There is no defined conflict between the holdings of the United States Courts of Appeals for the Second, Fifth and Sixth Circuits.*

The Court of Appeals in answering in the negative the question respondent presents here, refused to formulate any general rule approving or disapproving the "unit of time" argument, holding only "that under the circumstances of this case as disclosed by the record before us, it was proper" for the trial court to deny petitioner's motion. The court did not pronounce a rule of law in conflict with *Pennsylvania R. Co.* v. *McKinley,* 288 F2d 262, 267 (6 Cir. 1961) or *Johnson* v. *Colglazier,* 348 F2d 420, 424, 425 (5 Cir. 1965). In *McKinley* the verdict was not excessive, there was no appeal to passion or prejudice and the court refused to reverse because of the use of the "unit of time" argument; it also refused to "choose between the so-called Botta* rule and those authorities which appear to approve" of the "unit of time" argument, or to

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* The rule pronounced by the Supreme Court of the State of New Jersey in *Botta* v. *Brunner,* 1958, 26 N.J. 82, forbidding the use of "unit of time" argument.

"announce a procedural blueprint to be followed in all future trials"; the court stated that the control of such argument was the "duty and responsibility of the trial judge" and that it would reverse only where the exercise of his discretionary control "resulted in a miscarriage of justice or deprived one of the parties litigant of a fair trial." While here the Court of Appeals expressly refused to agree with the language of *McKinley* limiting reversal to cases of "miscarriage of justice" or deprivation of "a fair trial", it made no contrary pronouncement. Conflict between the Second and Sixth Circuits can arise only out of future cases. In *Johnson* counsel abused the "unit of time" argument to appeal to the passion, prejudice and sympathy of the jury; that element is absent here and in *McKinley*. While the Court of Appeals for the Sixth Circuit adopted a flat rule rejecting "unit of time" argument, it is not in conflict with *McKinley* or the case at bar; the Courts of Appeal in those cases expressly refused to make a choice and pronounce a rule of approval or disapproval.

2. *The question presented is not of sufficient importance to require adjudication by this court.*

The right of a federal judge not only "to guide and instruct the jury", but to comment on the evidence after the summation of counsel and his "control over excessive verdicts" afford adequate protection to defendants in personal injury litigation, *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424, 433. There is no reason for this court to pronounce a "procedural blueprint" for future trials, *Pennsylvania R. Co.* v. *McKinley* (Supra, p. 2).

3. *The facts of this case do not make a sufficient foundation on which to formulate an adequate workable rule on the use of the "unit of time" argument.*

The "unit of time" argument of respondent's counsel was not reported and it was made only as a suggestion; the jury was told that they might find the figures suggested too high or too low and that their determination of the value of pain and suffering controlled. Mere suggestion even where recorded is an insufficient basis on which to promulgate a rule for future cases. Without a record there is no basis on which to formulate an adequate workable rule.

4. *The summation not having been recorded the question posed is purely academic.*

This Court will review and adjudicate only on the record below, *Thomson* v. *Gaskill,* 315 U.S. 442, 446.

CONCLUSION

For the reasons stated a writ of certiorari should be denied.

Respectfully submitted,

GEORGE J. ENGELMAN
Attorney for Respondent.